Safeway Stores, Inc. *and* United Food and Commercial Workers Union, Local 73R, affiliated with United Food and Commercial Workers International Union, AFL-CIO-CLC. Case 16-CA-10335

15 July 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 21 September 1982 Administrative Law Judge John H. West issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The pertinent facts are as follows: Leann Foster, a night clerk at one of Respondent's stores, was told to leave work by the head clerk on 2 February 1982[1] because of an argument she had had with the head clerk over one of her job tasks. The next afternoon she called the Union about the suspension. The Union's business representative later contacted Mabe, Foster's supervisor, and then advised Foster to contact Mabe directly about the matter. According to Foster's credited testimony, when she called Mabe later that afternoon, Mabe inquired why she had waited so long to call and Foster responded that she had wanted to talk to the Union first. Mabe then told Foster that "this was against Company policy, and on that basis alone [he] ought to go ahead and suspend [her]." It was clear from the context of the discussion that Mabe's reference was to an alleged company policy prohibiting an employee from speaking to the Union before contacting a supervisor. Respondent, however, did not in fact have such a policy. Although not mentioned specifically by the Administrative Law Judge, Mabe stated later in the conversation that he was not going to suspend Foster and that she could return to work that evening, which she did.

The complaint, which alleges that Respondent violated Section 8(a)(1) of the Act by Mabe's remarks to Foster, issued approximately 2 weeks before the hearing herein. One week before the hearing, Mabe's district manager, Fidline, approached Foster and advised her that she had every right to contact the Union.

Without further explication, the Administrative Law Judge found that, although Mabe's remarks constituted a "technical violation" of the Act, they were of such a nature as not to warrant a formal unfair labor practice finding.[2] The General Counsel has filed exceptions to the Administrative Law Judge's finding that no remedial order is warranted here. For the reasons set forth below, we find merit in the General Counsel's exceptions.

Contrary to the Administrative Law Judge, we find that Mabe's statements were serious and highly coercive remarks. Thus, Mabe's inquiry as to why Foster contacted the Union first and his threat to suspend her for doing so necessarily interfered with Foster's right to representation from the bargaining agent and, as such, could not but tend to inhibit her in the exercise of rights guaranteed by Section 7 of the Act.[3] We therefore find that these statements constituted a serious violation of Section 8(a)(1) of the Act.

Furthermore, there has been no showing that Mabe's statements were repudiated effectively by Respondent's later conduct. The standards for effective repudiation were set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), as follows:

> To be effective . . . such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435,

[1] All dates are in 1982 unless indicated otherwise.

[2] In his Decision, the Administrative Law Judge noted that at the hearing he granted counsel for the General Counsel's motion to take official notice of any violation in the four other unfair labor practice cases he tried on the same day involving the same parties. However, he concluded that nothing in the other cases warranted a different result herein. In view of our decision, we find it unnecessary to consider the significance, if any, that the four other unfair labor practice cases might have in the instant proceeding.

[3] See *Holiday Inn of Santa Maria*, 259 NLRB 649, 661-662 (1981); *Morton's IGA Foodliner*, 237 NLRB 667 (1978).

1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

Applying these criteria to Fidline's statement to Foster, we find that the purported disavowal of Mabe's threat of suspension was ineffective to relieve Respondent of liability and to obviate the need for further remedial action. First, the attempted retraction was untimely. As noted above, Respondent did not attempt to correct Foster's impression of company policy until 1 week before the hearing. Thus, although Mabe's erroneous statement of company policy was made on 2 February, Fidline's alleged retraction was not offered until more than 3 months later, after the complaint had issued. Furthermore, we conclude that the attempted retraction was neither sufficiently clear nor sufficiently specific to dissipate the effects of the unlawful conduct. Thus, Fidline's statement did not indicate expressly that Respondent, in fact, did not have a policy prohibiting employees from first discussing work-related matters with the Union but rather merely informed Foster that she had every right to contact the Union. Additionally, Fidline's statement did not refer to Mabe's unlawful threat. Finally, Fidline's statement to Foster contained no assurance that Respondent would not interfere with the exercise of its employees' Section 7 rights by such coercive conduct in the future.[4]

On the basis of all of the foregoing, we find that Respondent, through Mabe's remarks to Foster, violated Section 8(a)(1) of the Act by erroneously informing an employee that company policy required that she contact her supervisor before contacting the Union about a grievance and by telling her that her failure to do so was grounds for suspension. Moreover, since we conclude that Respondent has not repudiated its unlawful conduct effectively, we find that issuance of a remedial order in these circumstances is both necessary and proper to effectuate the purposes of the Act. We shall therefore issue our customary order to remedy the unlawful conduct herein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 73R, affiliated with United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instructing and directing employees to discuss work-related problems with management before discussing them with the Union and by threatening employees with suspension from employment for contacting the Union first, Respondent has violated Section 8(a)(1) of the Act.

[4] See *Passavant Memorial Area Hospital, supra*, and cases cited therein at 138-139.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Safeway Stores, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively instructing and directing employees to discuss work-related problems with management before discussing them with the Union and threatening employees with suspension from employment for contacting the Union first.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action:

(a) Post at Store #554 in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT coercively instruct and direct employees to discuss work-related problems with management before discussing them with the Union or threaten employees with suspension from employment for contacting the Union first.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under the Act.

SAFEWAY STORES, INC.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge: Upon a charge filed March 15, 1982, by United Food and Commercial Workers Union, Local 73R, hereinafter called the Union, a complaint was issued by the General Counsel on April 27, 1982, alleging that Respondent, Safeway Stores, Inc., through its store manager, Ron Mabe, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by instructing an employee to discuss with him any work-related problem before discussing it with the Union and by threatening the employee with suspension from employment because the employee contacted the Union. In its answer to the complaint, Respondent denied the allegations.

A hearing was held in Tulsa, Oklahoma, on May 12, 1982.[1] Upon the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Maryland corporation with corporate offices in Oakland, California, operates, as here pertinent, a group of retail stores in the Tulsa area. The complaint alleges, Respondent admits, and I find that, at all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Leann Foster, an employee of Safeway and a member of the Union, as the result of an argument she had with the head clerk at her store in the Tulsa area, was told to leave work at 1:30 a.m., on February 2. At approximately 2 p.m. that day she called the Union to find out what they could do about her suspension. The union representative later told Foster to call Mabe. When she did, at approximately 4 p.m., Mabe, according to credible testimony given by Foster:

> . . . wanted to know why I waited so long in the afternoon to call. I told him that I wanted to talk to the Union. . . . He then told me—or asked me if I knew that *this* was against Company policy, and on that basis alone, he ought to go ahead and suspend me.[2] [Emphasis supplied.]

Foster returned to work the evening of February 3.

Mabe's district manager, Fidline, advised Foster 1 week before the hearing herein that she had every right to go to the Union.

B. *Analysis*

While, as pointed out by the General Counsel, Mabe's above-described statement is a technical violation of the Act, it was the only incident of misconduct demonstrated on this record and, in my opinion, "is of such a nature as not to warrant either a formal unfair labor practice finding or issuance of a formal cease-and-desist order."[3]

[Recommended Order for dismissal omitted from publication.]

[1] All dates refer to 1982 unless otherwise indicated.

[2] Foster went on to explain that the underscored word in the quote referred to "speaking to the Union before . . . [she] talked to . . . Mabe." Mabe testified that he did mistakenly tell Foster that it was company policy that she speak to him before going to the Union. But he asserted that at no time did he tell her that she should be suspended for going to the Union first. Mabe testified that he spoke with Foster in the morning. Later he testified that the call could have occurred in the afternoon. Also, while Mabe testified that he spoke with a union representative, he was not sure whether he spoke with the representative before Foster called. The representative, Rex Reynolds, testified that after he received the call from Foster in the afternoon he called Mabe who told him to have Foster come to the store and talk to Mabe before he put her back to work. Reynolds then called Foster and told her to speak to Mabe. Mabe's denial that he told Foster she should or could be suspended for going to the Union first is not credited. Foster's account is very detailed. She impressed me as being a credible witness. On the other hand, Mabe was not sure about different aspects of this exchange. In view of this, I cannot credit his denial.

[3] *Thermalloy Corp.*, 213 NLRB 129, 133 (1974). This case was heard by me with four other cases involving Respondent and the Union, *viz*, Cases 16-CA-10341, 16-CA-10024, 16-CA-10378, and 16-CA-10179. The cases were not consolidated and although the General Counsel's motion to take notice of any violation in the other cases was granted, in my opinion, nothing in the other cases warrants a different result herein.